

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.**

FILED BY CLERK

OCT 30 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

PATRICIA O.,

Appellant,

v.

ARIZONA DEPARTMENT OF
ECONOMIC SECURITY,
ANNA O., and ROBERT O.,

Appellees.

2 CA-JV 2008-0064
DEPARTMENT A

MEMORANDUM DECISION

Not for Publication

Rule 28, Rules of Civil
Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 17732800

Honorable Stephen M. Rubin, Judge Pro Tempore

AFFIRMED

Jacqueline Rohr

Tucson
Attorney for Appellant

Terry Goddard, Arizona Attorney General
By Michelle R. Nimmo

Tucson
Attorneys for Appellee Arizona
Department of Economic Security

H O W A R D, Presiding Judge.

¶1 Appellant Patricia O., the mother of Anna, born in April 1997, and Robert, born in February 2001, appeals from the juvenile court's order terminating her parental rights on the grounds of chronic substance abuse, A.R.S. § 8-533(B)(3), and out-of-home placement pursuant to a court order for fifteen months or longer, § 8-533(B)(8)(c), formerly numbered § 8-533(B)(8)(b). *See* 2008 Ariz. Sess. Laws, ch. 198, § 2. Patricia challenges the sufficiency of the evidence to support the court's order. Additionally, she contends counsel for the children was ineffective. We affirm for the reasons stated below.

¶2 We will not disturb a juvenile court's order terminating parental rights unless it is clearly erroneous. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002). As long as there is reasonable evidence to support the factual findings upon which the order is based, we will affirm. *Id.* The court may only terminate a parent's rights if it finds by clear and convincing evidence that any statutory ground exists and if it also finds, by a preponderance of the evidence, that termination of the parent's rights is in the child's best interests. A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005).

¶3 The record establishes that Patricia has a long history of substance abuse and mental health issues and that she repeatedly has been unable to care for or protect her children. Two of Patricia's other children were adjudicated dependent in California in 1995. The family was reunited, but Patricia voluntarily placed those children in foster care in 1997. Again the family was reunited. In the fall of 2006, however, Anna, Robert, and

fourteen-year-old Tamara were removed from the home because prior investigations by Child Protective Services (CPS) had established Patricia was neglecting the children and could not care for them, despite services provided to assist the family. The children were dirty, Patricia reportedly was sleeping constantly, and Tamara was parenting the younger two children. Patricia could not address the emotional needs of Anna, who had been sexually abused by her father, and was unable to protect Robert from Anna's aggressive behavior. The children were adjudicated dependent in November 2006 after Patricia admitted allegations in an amended dependency petition. Among the allegations admitted were that the children could not remain in the home, despite the provision of services, because of Patricia's "mental illness" and "serious mental health problems."

¶4 The initial case plan goal was reunification of the family. But after a combined dependency review and permanency hearing at the end of December 2007, the juvenile court ordered the case plan goal changed to severance and adoption for Anna and Robert and long-term foster care for Tamara. As directed, the Arizona Department of Economic Security (ADES) filed a motion to terminate Patricia's parental rights to Anna and Robert in January 2008, alleging § 8-533(B)(3) and former § 8-533(B)(8)(b) as grounds. To terminate Patricia's rights under subsection (B)(3), the court had to find Patricia was "unable to discharge parental responsibilities because of mental illness, mental deficiency or a history of chronic abuse of dangerous drugs, controlled substances or alcohol" and also find "reasonable grounds to believe that the condition will continue for a prolonged

indeterminate period.” To terminate her rights under former subsection (B)(8)(b), the court was required to find the children had

been in an out-of-home placement for a cumulative total period of fifteen months or longer pursuant to court order . . . , the parent has been unable to remedy the circumstances that cause the child[ren] to be in an out-of-home placement and there is a substantial likelihood that the parent will not be capable of exercising proper and effective parental care and control in the near future.

¶5 After a contested severance hearing, the juvenile court granted ADES’s motion, finding in a June 2008 minute entry that ADES had established both grounds alleged. The court found, inter alia, that Patricia had a long-term substance abuse problem, having abused marijuana and, at one point, oxycontin, which she took without a prescription, and that this problem had affected her ability to parent her children. As a consequence of Patricia’s substance abuse, the court found, the children had remained out of the home for more than fifteen months, despite the fact that ADES had provided appropriate services designed to reunify the family. The court specified that Patricia had used marijuana for twenty-three years, testing positive as recently as six weeks before the severance hearing.

¶6 The juvenile court also noted that Patricia had dismissed her use of marijuana as “not a big deal,” which the court viewed as illustrative of her lack of “insight into how her substance abuse has impacted her ability to parent.” Based on this and other evidence, including the psychological evaluation report and testimony of Dr. Michael German, the

court found Patricia likely would continue to have substance abuse problems in the future and remain unable to parent her children adequately. Finding further that the children were adoptable, that a relative had expressed a desire to adopt them, and that they were in need of permanency, the court concluded termination of Patricia's parental rights was in the children's best interests.

¶7 On appeal, Patricia first challenges the sufficiency of the evidence as to both grounds simultaneously. She asserts that “[t]he majority of the evidence centered on what had occurred in the past,” adding that the psychological evaluation had been completed over a year earlier and that “[s]he is currently involved in intensive outpatient substance abuse [treatment].” Additionally, she contends “[t]here was no concrete evidence” that she “had failed to benefit from the services she had completed” and that “[t]here was no evidence” she “was unable to parent, now.” Factually, the grounds in this case were interrelated; it was Patricia's substance abuse and serious mental health issue that had affected her ability to parent and resulted in her failure to remedy the circumstances that kept the children from being returned to her. For this reason, and because of the way Patricia presented her arguments, we address the challenges on both grounds together, even though we need only find sufficient evidence to sustain the court's ruling on one ground. *See Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 27, 995 P.2d 682, 687 (2000).

¶8 The record contains ample evidence to support the juvenile court's factual findings that relate to both statutory grounds for terminating Patricia's parental rights. The

court noted some of the evidence it had relied on, but ADES had presented additional evidence as well. Patricia asserts she benefitted from the services, suggesting the evidence was therefore insufficient to support the order. That Patricia may have benefitted from the services ADES provided does not negate the findings that were necessary to establish the statutory grounds. The court was well aware of any progress Patricia may have made. But it was for the court to weigh all of the evidence and determine whether it nevertheless sufficiently established bases for terminating her rights. *See Jesus M.*, 203 Ariz. 278, ¶ 12, 53 P.3d at 207 (“The resolution of . . . conflicts in the evidence is uniquely the province of the juvenile court as the trier of fact; we do not re-weigh the evidence on review.”).

¶9 Patricia’s contention that the juvenile court terminated her rights based predominantly on past conduct is simply belied by the record. Moreover, Patricia fails to recognize that the statutory grounds themselves required the court to draw inferences from her past conduct and make predictions about the likelihood that she would be able to parent the children adequately in the future. Given Patricia’s long history of substance abuse, the fact that she tested positive for marijuana just six weeks before the termination hearing, and the evidence that, historically, her substance abuse problem has contributed significantly to her neglect of these and other children, there was more than adequate support for the court’s projections.

¶10 The evidence included the report and testimony of Dr. Lorraine Rollins, who had evaluated Patricia in December 2006. Rollins stated in her report that, if Patricia were

to relapse, she “likely would pose increased significant risk for neglect or some form of abuse of any child in her care.” When asked about the significance Rollins would place on the fact that Patricia had continued to use marijuana since the evaluation, she testified, “[T]hat reflects . . . ongoing problems with at least substance abuse if not substance dependence, and that would be a negative factor for her in a parenting role.” She testified further that she was not sure she could answer definitely whether Patricia’s substance abuse likely would continue into the future for an indeterminate period of time; but, she stated, “It sounds likely . . . since she’s been in a monitored situation, and—she knew that she needed to demonstrate abstinence in order to get her children reunited.” Rollins explained Patricia’s history was a significant factor in Rollins’s determination that Patricia’s prognosis was poor because she had been provided services yet repeatedly her children needed to be removed.

¶11 Drs. German and Edward Lovejoy, who psychologically evaluated the entire family in May 2007, spent a day in the home and concluded in their report that Patricia “is simply not capable of effectively parenting her children.” German testified that Patricia was “virtually incapable of caring for herself let alone children.” He added, “Everything I know, everything I saw made me feel that the chances were very unlikely that she would be able to parent the children.” Additionally, the family’s caseworker testified Patricia could not parent her children and used marijuana to cope with stress.

¶12 Patricia also challenges the juvenile court’s finding that termination of her rights to the children was in their best interests. Again she argues there was insufficient evidence that she would not be able to parent the children in the near future. We have already concluded there was reasonable evidence to the contrary. And, reasonable evidence also supported the court’s findings that the children needed permanency, that they were adoptable, that a relative had expressed an interest in adopting Anna and Robert, and that Robert’s foster mother also was interested in adopting him. These factors supported the court’s conclusion that termination was in the children’s best interests. *See Mary Lou C. v. Ariz. Dep’t of Econ. Sec.*, 207 Ariz. 43, ¶ 19, 83 P.3d 43, 50 (App. 2004) (best interests finding must be supported by evidence that ““child would benefit from a severance or be harmed by the continuation of the relationship””), *quoting Maricopa County Juv. Action No. JS-500274*, 167 Ariz. 1, 5, 804 P.2d 730, 734 (1990).

¶13 Finally, we reject Patricia’s contention that the children’s counsel had been ineffective both in representing them below and in failing to appeal the termination order. Patricia did not raise below the claim of ineffective assistance of counsel in the juvenile court proceedings, thereby waiving that claim. *Cf. Adrian E. v. Ariz. Dep’t of Econ. Sec.*, 215 Ariz. 96, ¶ 24, 158 P.3d 225, 232 (App. 2007) (parent waived objection to introduction of report as exhibit by failing to object below). And, even if the claim arguably could be raised for the first time on appeal, we agree with ADES that it has not been adequately presented on appeal. *See Ariz. R. Civ. App. P. 13(a)(6)*; *see also Ariz. R. P. Juv. Ct. 106(A)* (applying

to juvenile proceedings Rule 13, Ariz. R. Civ. App. P.). Perhaps more importantly, however, Patricia lacks standing to raise this issue. *See In re Pima County Juv. Action No. S-113432*, 178 Ariz. 288, 291, 872 P.2d 1240, 1243 (App. 1993) (finding father lacked standing to assert existence of conflict between children necessitating appointment of separate counsel or guardian ad litem for each); *cf. Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 1 (2004) (finding parent lacked standing to bring claim on behalf of child protesting requirement to recite pledge of allegiance in school).

¶14 For the reasons stated, the juvenile court's order terminating Patricia's parental rights to Anna and Robert is affirmed.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

J. WILLIAM BRAMMER, JR., Judge